

1 UNITED STATES DISTRICT COURT  
2 DISTRICT OF NEVADA

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4 TIMOTHY CASEY,

Case No. 2:18-cv-00546-EJY

5 Plaintiff,

6 v.

**ORDER**

7 ANDREW SAUL, Acting Commissioner of  
8 Social Security,<sup>1</sup>

Re: Motion for Summary Judgment and/or  
Remand (ECF No. 16)

9 Defendant.

10 Plaintiff Timothy Casey ("Plaintiff") seeks judicial review of the final decision of the  
11 Commissioner of the Social Security Administration ("Commissioner" or the "Agency") denying  
12 his application for disability insurance ("DIB") and supplemental security income ("SSI") under  
13 Title II and Title XVI of the Social Security Act, respectively. For the reasons stated below, the  
14 Commissioner's decision is reversed, and this case is remanded for further proceedings consistent  
15 with this Order.

16 **I. BACKGROUND**

17 On September 3, 2013 and on February 7, 2014, Plaintiff filed applications for DIB and SSI,  
18 respectively, alleging onset of disability beginning June 15, 2009. Administrative Record ("AR")  
19 162–63, 175–86. The Commissioner denied Plaintiff's Title II claims by initial determination on  
20 February 5, 2014, and again upon reconsideration on May 29, 2014. AR 60–92. On July 21, 2014,  
21 Plaintiff requested a hearing before an Administrative Law Judge ("ALJ"). AR 101–02. After  
22 considering both of Plaintiff's Title II and XVI claims at an administrative hearing on March 9, 2016  
23 (AR 24–52), ALJ Sharilyn Hopson issued her determination that Plaintiff was not disabled on March  
24 28, 2016 (AR 7–19). On April 13, 2016, Plaintiff requested that the Appeals Council review the  
25 decision by the ALJ. AR 159–160. On January 23, 2018, the Appeals Council denied Plaintiff's

26  
27 <sup>1</sup> Andrew Saul is the current Commissioner of Social Security and is automatically substituted as a party pursuant  
28 to Fed. R. Civ. P. 25(d). *See also* 42 U.S.C. § 405(g) ("Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Commissioner of Social Security or any vacancy in such office.").

1 request for review. AR 1–5. Upon denial of Plaintiff’s request for review by the Appeals Council,  
2 the ALJ’s March 28, 2016 decision became the final order of the Commissioner. 42 U.S.C. § 405(h).

## 3 II. STANDARD OF REVIEW

4 The reviewing court shall affirm the Commissioner’s decision if the decision is based on  
5 correct legal standards and the legal findings are supported by substantial evidence in the record. 42  
6 U.S.C. § 405(g); *Batson v. Comm’r Soc. Sec. Admin.*, 359 F.3d 1190, 1193 (9th Cir. 2004).  
7 Substantial evidence is “more than a mere scintilla. It means such relevant evidence as a reasonable  
8 mind might accept as adequate to support a conclusion.” *Richardson v. Perales*, 402 U.S. 389, 401  
9 (1971) (internal citation and quotation marks omitted). In reviewing the Commissioner’s alleged  
10 errors, the Court must weigh “both the evidence that supports and detracts from the  
11 [Commissioner’s] conclusions.” *Martinez v. Heckler*, 807 F.2d 771, 772 (9th Cir. 1986).

12 “When the evidence before the ALJ is subject to more than one rational interpretation, we  
13 must defer to the ALJ’s conclusion.” *Batson*, 359 F.3d at 1198, citing *Andrews v. Shalala*, 53 F.3d  
14 1035, 1041 (9th Cir. 1995). A reviewing court, however, “cannot affirm the decision of an agency  
15 on a ground that the agency did not invoke in making its decision.” *Stout v. Comm’r Soc. Sec.*  
16 *Admin.*, 454 F.3d 1050, 1054 (9th Cir. 2006) (internal citation omitted). Finally, the court may not  
17 reverse an ALJ’s decision on account of an error that is harmless. *Burch v. Barnhart*, 400 F.3d 676,  
18 679 (9th Cir. 2005) (internal citation omitted). “[T]he burden of showing that an error is harmful  
19 normally falls upon the party attacking the agency’s determination.” *Shinseki v. Sanders*, 556 U.S.  
20 396, 409 (2009).

## 21 III. DISCUSSION

### 22 A. Establishing Disability Under The Act

23 To establish whether a claimant is disabled under the Act, there must be substantial evidence  
24 that:

- 25 (a) the claimant suffers from a medically determinable physical or mental  
26 impairment that can be expected to result in death or that has lasted or can be  
27 expected to last for a continuous period of not less than twelve months; and  
28 (b) the impairment renders the claimant incapable of performing the work that  
the claimant previously performed and incapable of performing any other  
substantial gainful employment that exists in the national economy.

1 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999), *citing* 42 U.S.C. § 423(d)(2)(A). “If a claimant  
2 meets both requirements, he or she is disabled.” *Id.*

3 The ALJ employs a five-step sequential evaluation process to determine whether a claimant  
4 is disabled within the meaning of the Act. *Bowen v. Yuckert*, 482 U.S. 137, 140 (1987); 20 C.F.R.  
5 § 404.1520(a). Each step is potentially dispositive and “if a claimant is found to be ‘disabled’ or  
6 ‘not-disabled’ at any step in the sequence, there is no need to consider subsequent steps.” *Tackett*,  
7 180 F.3d at 1098; 20 C.F.R. § 404.1520. The claimant carries the burden of proof at steps one  
8 through four, and the Commissioner carries the burden of proof at step five. *Tackett*, 180 F.3d at  
9 1098.

10 The five steps are:

11 Step 1. Is the claimant presently working in a substantially gainful activity? If so,  
12 then the claimant is “not disabled” within the meaning of the Social Security Act  
13 and is not entitled to disability insurance benefits. If the claimant is not working in  
a substantially gainful activity, then the claimant’s case cannot be resolved at step  
one and the evaluation proceeds to step two. *See* 20 C.F.R. § 404.1520(b).

14 Step 2. Is the claimant’s impairment severe? If not, then the claimant is “not  
15 disabled” and is not entitled to disability insurance benefits. If the claimant’s  
impairment is severe, then the claimant’s case cannot be resolved at step two and  
the evaluation proceeds to step three. *See* 20 C.F.R. § 404.1520(c).

16 Step 3. Does the impairment “meet or equal” one of a list of specific impairments  
17 described in the regulations? If so, the claimant is “disabled” and therefore entitled  
18 to disability insurance benefits. If the claimant’s impairment neither meets nor  
equals one of the impairments listed in the regulations, then the claimant’s case  
19 cannot be resolved at step three and the evaluation proceeds to step four. *See* 20  
C.F.R. § 404.1520(d).

20 Step 4. Is the claimant able to do any work that he or she has done in the past? If  
21 so, then the claimant is “not disabled” and is not entitled to disability insurance  
benefits. If the claimant cannot do any work he or she did in the past, then the  
22 claimant’s case cannot be resolved at step four and the evaluation proceeds to the  
fifth and final step. *See* 20 C.F.R. § 404.1520(e).

23 Step 5. Is the claimant able to do any other work? If not, then the claimant is  
24 “disabled” and therefore entitled to disability insurance benefits. *See* 20 C.F.R. §  
404.1520(f)(1). If the claimant is able to do other work, then the Commissioner  
25 must establish that there are a significant number of jobs in the national economy  
that claimant can do. There are two ways for the Commissioner to meet the burden  
26 of showing that there is other work in “significant numbers” in the national  
economy that claimant can do: (1) by the testimony of a vocational expert [(“VE”)],  
27 or (2) by reference to the Medical-Vocational Guidelines at 20 C.F.R. pt. 404,  
subpt. P, app. 2. If the Commissioner meets this burden, the claimant is “not  
28 disabled” and therefore not entitled to disability insurance benefits. *See* 20 C.F.R.

1           §§ 404.1520(f), 404.1562. If the Commissioner cannot meet this burden, then the  
2           claimant is “disabled” and therefore entitled to disability benefits. *See id.*

3           *Id.* at 1098–99 (internal alterations omitted).

4           **B. Summary of ALJ’s Findings**

5           At step one, the ALJ determined that Plaintiff did not engage in substantial gainful activity  
6           since June 15, 2009, the alleged onset date of disability. AR 12. At step two, the ALJ found that  
7           Plaintiff suffered from medically determinable severe impairments consisting of “right wrist De  
8           Quervain’s tenosynovitis; mild tenderness of the sacroiliac joints; paraspinal right scapular  
9           tenderness to palpation; degenerative disc disease with bilateral foraminal stenosis; plantar fasciitis;  
10          bilateral carpal tunnel with bilateral releases; osteoarthritis of bilateral thumbs; status post excision  
11          of neuroma fourth interspace left foot; and neuropathy of bilateral wrists.”<sup>2</sup> *Id.* At step three, the  
12          ALJ found that Plaintiff’s impairment or combination of impairments did not meet or medically  
13          equal the severity of any “listed” impairment in 20 C.F.R., Part 404, Subpart (“Subpt.”) P, Appendix  
14          (“App.”) 1. AR 14–15.

15          In preparation for step four, the ALJ found that Plaintiff had the residual functional capacity  
16          (“RFC”)<sup>3</sup> to:

17               [P]erform a range of light work as defined in 20 CFR 404.1567(b) and 416.967(b)  
18               and SSR [Social Security Ruling] 83-10 specifically as follows: the claimant can  
19               lift and/or carry 20 pounds occasionally and 10 pounds frequently; he can stand  
20               and/or walk for six hours out of an eight-hour workday; he can sit for six hours out  
21               of an eight-hour workday; he requires the use of a cane as needed and the ability to  
22               the ability [sic] to stand and stretch every hour, estimated to take one to three  
23               minutes per hour; he can frequently climb stairs; he can occasionally climb ladders,  
24               ropes and scaffolds; he can frequently balance, stoop, kneel, crouch, and crawl; and  
25               he is limited to frequent fine and gross manipulation.

26          AR 15.

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27          <sup>2</sup> Although immaterial to this Court’s decision today, the ALJ properly found that Plaintiff’s “status post  
28          appendectomy and minimal hematuria . . . would have no more than a minimal effect on his ability to work.” AR 13.  
The ALJ also appropriately consulted the four functional areas set out in the disability regulations for evaluating mental  
disorders under section 12.00C of the Listing of Impairments (20 C.F.R. Part 404, Subpt. P, App. 1, otherwise known as  
the “paragraph B” criteria) in finding that Plaintiff’s “substance abuse disorder, depression and anxiety disorder” caused  
no more than minimal limitation in his ability to work and was, therefore, nonsevere. *Id.*

29          <sup>3</sup> “Residual functional capacity” is defined as “the most you can still do despite your limitations.” 20 C.F.R. §  
416.945(a)(1).

1 At step four, the ALJ determined that “[t]he claimant is capable of performing past relevant  
2 work as a human services companion and copy clerk. This work does not require the performance  
3 of work-related activities precluded by the claimant’s residual functional capacity.” AR 18. In  
4 making this finding, the ALJ considered the testimony of the vocational expert, who testified that:

5 the claimant worked within the last 15 years in the following occupations:

- 6 1. Human services companion, DOT<sup>4</sup> 309.677-010, . . . a light, semiskilled  
7 (SVP<sup>4</sup> 3) occupation as generally performed pursuant to the DOT and as performed  
8 by the claimant;
- 9 2. Foreman/worker, tree service, DOT 408.137-014, . . . a medium, skilled  
10 (SVP 6) occupation as generally performed pursuant to the DOT, but actually  
11 performed as heavy work as described by the claimant; and
- 12 3. Copier, DOT 249-366-010, . . . a light, unskilled (SVP 2) occupation as  
13 generally performed pursuant to the DOT, but actually performed as semiskilled  
14 (SVP 4) work as described by the claimant.<sup>4</sup>

15 AR 18–19.

16 The ALJ concluded that “[t]he claimant has not been under a disability, as defined in the  
17 Social Security Act, from June 15, 2009, through [March 28, 2016,] the date of this decision.” AR  
18 19. Therefore, the ALJ denied Plaintiff’s applications for disability insurance benefits and  
19 supplemental security income, because the claimant was not disabled under sections 216(i) and  
20 223(d) and section 1614(a)(3)(A), respectively, of the Social Security Act. *Id.*

### 21 **C. Plaintiff’s Symptom Testimony**

22 On examination by ALJ Hopson, Plaintiff testified that he last worked as a home support  
23 worker for the County of Mendocino “answer[ing] . . . phone[s], . . . [sitting] with mentally ill 51/50  
24 clients[,] and dr[iving clients] to different hospitals” in 2009. AR 27. Plaintiff was terminated from  
25 his job because of “budget cuts,” but he claims he would have left the job regardless because he  
26 could no longer drive, sit, walk, or stand for extended periods of time. AR 28. Previously, Plaintiff  
27 held a job “ma[king] photocopies of papers, oversized papers, [and] blueprints” for a church friend.  
28 *Id.* Before his copier job, Plaintiff worked as a “foreman and . . . tree climber.” AR 29. Plaintiff  
has not applied for any other jobs after leaving his position with Mendocino County. AR 31. Since

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<sup>4</sup> “DOT” is an abbreviation for *Dictionary of Occupational Titles* (U.S. Department of Labor, 1991). “SVP” is an abbreviation for “Specific Vocational Preparation,” as defined in Appendix C of the DOT.

1 that time, Plaintiff's "source of income" has been his wife's retirement fund. *Id.* Plaintiff has not  
2 received any worker's compensation or unemployment benefits since his alleged onset date of  
3 disability. *Id.*

4 Plaintiff currently lives in a house with "three stairs going up to the front porch." *Id.* Plaintiff  
5 traverses the stairs by "hang[ing] onto the railing" and uses a prescribed cane at all times. AR 31–  
6 32. Plaintiff lives at home with his "wife, . . . daughter-in-law[,] and four grandkids." AR 32.  
7 Plaintiff does not take care of his grandchildren. *Id.* Plaintiff has a driver's license and  
8 "[o]ccasionally" drives: he explained that occasionally means "[m]aybe [a trip] to the corner store  
9 if [he] need[s] a pack of cigarettes[,] . . . but any long trips [his] wife drives and [he] lay[s] in the  
10 passenger seat." *Id.* For example, Plaintiff's wife drove him to the administrative hearing. AR 33.  
11 Plaintiff has not consumed alcohol since 2011; before then, however, he was drinking on a "daily"  
12 basis. *Id.* Plaintiff smokes marijuana every night to "help [him] eat and . . . sleep[, because t]he  
13 pain pills that [he is] on don't leave an appetite[.]" *Id.* Plaintiff smokes "[a]bout a pack" of cigarettes  
14 per day. *Id.* Plaintiff's highest level of education was twelfth grade of high school. AR 33–34.

15 On examination by his attorney, Plaintiff testified that he was "having a lot of feet problems  
16 and back issues" when he stopped working in 2009. AR 34. Back then, Plaintiff was seeing his  
17 doctor for pain treatment and was prescribed medication. AR 35. Plaintiff explained that his "heels  
18 get super sore where they can't take the pressure and . . . [he used to experience a] burning and  
19 tearing feeling in the bottom of each feet, which ended up being [diagnosed as] plantar fasciitis." *Id.*  
20 Plaintiff no longer experiences the tearing and burning as much anymore because of his surgeries,  
21 but the heel pain remains "tremendous." *Id.* In addition, Plaintiff suffers residual problems  
22 associated with his surgeries to this day. *Id.* Plaintiff has problems "sitting and with [his] heels on  
23 the ground[,] . . . standing[,] and walking[.]" *Id.*

24 Plaintiff does not believe that he could have performed a job that required him "to be on [his]  
25 feet for half the workday" in 2009. AR 36. However, Plaintiff believes he could have consistently  
26 performed "a job where [he] didn't have to be on [his] feet for more than two hours out of an eight-  
27 hour workday" if he could take intermittent breaks standing and walking. *Id.* Plaintiff cannot  
28 continuously sit for longer than six hours in an average eight-hour workday, because his "back shoots

1 pain down [his] right leg and [he] get[s] this burning feeling underneath [his] butt cheek.” AR 36–  
2 37. Plaintiff’s back caused him problems since 2009, when he stopped working in Mendocino  
3 County. AR 37. Plaintiff has not had continuous medical insurance since then. *Id.* However,  
4 Plaintiff visited a physician for problems with his hands when he regained insurance coverage under  
5 Obamacare for a period of time around 2014. AR 38. At that time, both of Plaintiff’s hands would  
6 “lock up and burn and tingle”; thereafter, he was diagnosed with “severe carpal tunnel, so [he] had  
7 surgeries on both hands[.]” *Id.* Plaintiff still experiences “tingl[ing] . . . on [his] right thumb,” which  
8 “locks up” and causes him to experience “jolts of pain.” AR 38–39. “Just holding a cup of coffee  
9 will make [Plaintiff’s right] thumb lock up. Opening a door[, jar, or cupboard] will hurt it.” AR 39.  
10 Plaintiff testified that he is unable to hold a “job where [he] had to [grasp, hold, and/or turn] with  
11 [his] right hand” for up to two-thirds of an average eight-hour workday, and stated that it would be  
12 “tough” to grasp, hold, and/or turn with his right hand for up to two and a half hours per workday.  
13 *Id.* However, Plaintiff stated that fingering with his hands, excluding his thumbs, does not cause  
14 him problems, although he will “occasionally . . . get a burning pain that goes down from the carpal  
15 tunnel.” AR 39–40. Plaintiff confirmed that “us[ing his] opposable digit[s] . . . for holding” is the  
16 activity that causes the most problems for him. AR 40.

17 Plaintiff has problems “focusing” and “concentrating.” *Id.* Plaintiff is prone to anger,  
18 because when he is “in pain constantly it seems like [he] never get[s] a chance to relax or [the pain  
19 is] just constantly there.” AR 40–41. Plaintiff had a neuroma removed from his left foot, but does  
20 not have any residual problems from that surgery now. AR 41. To this day, however, Plaintiff’s  
21 “hip hurts, [and he] get[s] a burning pain that runs down [his] leg and it feels like somebody [stuck]  
22 a lighter underneath [his] butt cheek.” *Id.*

23 **D. Vocational Expert (“VE”) Testimony**

24 VE Alan Boroskin testified at Plaintiff’s administrative hearing that:

25 From ’06 to ’09 [Plaintiff] worked in human services[ as] a companion, DOT  
26 [number] 309.677-010, [a] semiskilled [job] with an SVP of 3, light exertional. In  
27 ’01 he worked as a foreman and worker for a tree service, DOT 408.137-014, [a]  
28 skilled [job] with an SVP of 6, medium exertional per the DOT, heavy [exertional]  
as described by the claimant. And ’04 to ’05 he worked doing blueprints and copies

1 at a copy shop, DOT 249.366-010, [a] semiskilled [job] with an SVP of 4 as  
2 performed, DOT has [the copier position] at SVP 2 and light exertional in either  
case.

3 AR 43–44. ALJ Hopson asked VE Boroskin to assume a hypothetical individual that included, a  
4 person who:

5 is 45-years-old at his alleged onset date, has a 12th grade education, is literate,  
6 speaks English and can perform the demands of work within the following RFC.  
7 He can lift and/or carry 10 pounds frequently, 20 pounds occasionally, he can stand,  
8 walk or sit six hours out of an eight-hour day with the use of a cane as needed and  
9 the ability to stand and stretch every hour estimated to take one to three minutes per  
hour. He can frequently climb stairs, occasionally climb ladders, ropes and  
scaffolds, he can frequently balance, stoop, kneel, crouch and crawl and he can do  
frequent fine and gross manipulation. Could this person do the claimant’s past  
relevant work?

10 AR 44. VE Boroskin confirmed that the foregoing hypothetical person could perform Plaintiff’s  
11 past relevant work as a “human services [companion] and the copier . . . per the DOT and as actually  
12 performed.” *Id.*

13 For her second hypothetical, ALJ Hopson asked VE Boroskin to build on her first  
14 hypothetical by changing the “frequent” level of fine and gross manipulation to “occasional.” *Id.*  
15 The VE responded that this second hypothetical individual would not be able to perform claimant’s  
16 past relevant work. *Id.*

17 However, VE Boroskin stated that this second hypothetical individual could perform:

18 jobs requir[ing] only occasional or less use of the hands and fingers, as well as  
19 reaching[, including positions as an] investigator [of] dealer accounts, . . . DOT  
20 code . . . 241.367-038, . . . [an] unskilled [position], SVP 2, light exertional, [with]  
21 36,600 such jobs nationally. [The hypothetical individual could also work as a]  
boat rental clerk, DOT 295.467-014, [an] unskilled [position], SVP 2, light  
exertional, [with] 23,000 such jobs nationally.

22 AR 45.

23 ALJ Hopson then asked VE Boroskin to assume a third hypothetical individual who:

24 can lift and/or carry 10 pounds frequently, 20 pounds occasionally, . . . can stand  
25 and/or walk four hours out of an eight-hour day and sit six hours out of an eight-  
26 hour day with the use of a cane as needed and the ability to stand and stretch every  
27 hour estimated to take one to three minutes per hour. [The third hypothetical  
individual] can frequently climb stairs, no ladders, ropes or scaffolds, he can  
frequently balance, stoop, kneel, crouch and crawl and he can do frequently fine  
and gross manipulation. Could this person do the claimant’s past relevant work?



1 *Id.* The VE responded that he could not. *Id.* Notwithstanding, VE Boroskin opined that this third  
2 hypothetical individual could perform occupations with:

3 sit/stand options, that is[,] they can sit or stand at will throughout the day. . . . [O]ne  
4 example would be that of a cashier II, . . . a highly restricted range of the cashier II  
5 position, only 16% of the full range, and these are typically found in parking  
6 garages, minimarts and the sort, a DOT code of 211.462-010, light, [an] unskilled  
[position], SVP 2, [with] 75,500 such jobs nationally. That is the reduced amount.  
Another example would be that of an information clerk, DOT 237.367-018, light,  
[an] unskilled [position], SVP 2, [with] 62,700 such jobs nationally.

7 AR 46. The VE clarified that he provided a conservative amount of cashier II jobs in the national  
8 economy, because the ALJ asked him to hypothesize an individual who used a cane and exercised  
9 the stand and stretch option. *Id.*

10 ALJ Hopson then presented VE Boroskin with a fourth hypothetical by “limit[ing] the third  
11 hypothetical individual] to occasional fine and gross manipulation,” and asked whether this fourth  
12 hypothetical person could perform any work in the national economy. *Id.* The VE responded that  
13 no such work existed. *Id.* ALJ Hopson then amended her fourth hypothetical to allow the individual  
14 to:

15 lift and/or carry 10 pounds frequently [and] 10 pounds occasionally, stand and/or  
16 walk two hours out of an eight-hour day and sit six hours out of an eight-hour day.  
17 He can occasionally climb stairs, no ladders, ropes or scaffolds, he can occasionally  
balance, stoop, kneel, crouch and crawl, and he’s limited to frequent fine and gross  
manipulation.

18 AR 46–47. The ALJ also noted that this fourth hypothetical individual would use a “cane and [have]  
19 the ability to stand and stretch every hour, estimated to take one to three minutes per hour.” AR 47.  
20 VE Boroskin testified that this fourth hypothetical individual would not be able to perform  
21 claimant’s past relevant work, but would be able to work as a “[t]elephone quotation clerk, DOT  
22 237.367-046, [an] unskilled [job], SVP 2, sedentary exertional, [with] 86,000 such jobs nationally.  
23 . . . Another example[ is an] order clerk, food and beverage, DOT 209.567-014, [an] unskilled [job],  
24 SVP 2, sedentary exertional, 25,800 such jobs nationally.” *Id.* However, if the ALJ changed this  
25 fourth hypothetical to limit the individual to “occasional” fine and gross manipulation, the VE  
26 opined that this person would not be able to perform claimant’s past relevant work or any other work  
27 in the national economy. *Id.*

1 The VE testified that a hypothetical individual in any of the above situations would not be  
2 able to perform claimant's past relevant work or any other work in the national economy if he were  
3 to be off task 20% of the average workday or more, or if he were to be absent three or more days a  
4 month. AR 47–48.

5 On examination by Plaintiff's counsel, VE Boroskin testified that the first hypothetical  
6 individual would be precluded from working entirely if he were limited to sitting for a maximum of  
7 four hours and walking for a maximum of two hours in an average eight-hour workday. AR 48. The  
8 VE clarified that the "cashier II and information clerk" positions, as applied to the third hypothetical  
9 individual, would require lifting up to ten pounds. AR 49. VE Boroskin noted that these two  
10 occupations are classified as "light" because "they can be done standing." *Id.* However, a cashier  
11 II or an information clerk could, in practice, perform his job sitting or standing, and without pushing  
12 or pulling. AR 49–50.

13 **E. Issues Presented**

14 Plaintiff maintains the ALJ erred by: (1) failing to articulate a clear and convincing reason  
15 for rejecting his subjective complaints (ECF No. 16 at 5:13–8:16) and (2) providing an RFC  
16 unsupported by substantial evidence (*id.* at 8:18–10:15). The Court examines Plaintiff's arguments  
17 below.

18 **1. The ALJ's Credibility Determination**

19 The ALJ must engage in a two-step analysis when evaluating a claimant's testimony  
20 concerning pain, symptoms, and level of limitation is credible. *Garrison v. Colvin*, 759 F.3d 995,  
21 1014 (9th Cir. 2014). First, "the ALJ must determine whether the claimant has presented objective  
22 medical evidence of an underlying impairment 'which could reasonably be expected to produce the  
23 pain or other symptoms alleged.'" *Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007),  
24 citing *Bunnell v. Sullivan*, 947 F.2d 341, 344 (9th Cir. 1991) (en banc). Second, if there is no  
25 evidence of malingering, "the ALJ can reject the claimant's testimony concerning the severity of his  
26  
27  
28

1 symptoms only by offering specific, clear and convincing reasons for doing so.”<sup>5</sup> *Garrison*, 759  
2 F.3d at 1014–15 (internal citation omitted). An ALJ’s finding on this matter must be properly  
3 supported by the record and sufficiently specific to ensure a reviewing court that the ALJ did not  
4 “arbitrarily discredit” a claimant’s subjective testimony. *Thomas v. Barnhart*, 278 F.3d 947, 958  
5 (9th Cir. 2002) (citation omitted).

6 In weighing a claimant’s credibility for cases involving ALJ decisions rendered on or after  
7 March 28, 2016, including the present case, the ALJ may consider Plaintiff’s: (1) daily activities;  
8 (2) the location, duration, frequency, and intensity of pain or other symptoms; (3) factors that  
9 precipitate and aggravate the symptoms; (4) the type, dosage, effectiveness, and side effects of any  
10 medication an individual takes or has taken to alleviate pain or other symptoms; (5) treatment, other  
11 than medication, an individual receives or has received for relief of pain or other symptoms; (6) any  
12 measures other than treatment an individual uses or has used to relieve pain or other symptoms; and,  
13 (7) any other factors concerning an individual’s functional limitations and restrictions due to pain or  
14 other symptoms.<sup>6</sup> SSR 16-3p (eff. Mar. 28, 2016), 2016 WL 1119029, at \*7; 20 C.F.R. §§  
15 404.1529(c), 416.929 (c). The ALJ is instructed to “consider all of the evidence in an individual’s  
16 record,” “to determine how symptoms limit ability to perform work-related activities.” SSR 16-3p,  
17 2016 WL 1119029, at \*2. Notwithstanding, a claimant’s statements about his pain or other  
18 symptoms alone will not establish that he is disabled. 20 C.F.R. § 416.929(a)(1); 42 U.S.C. §  
19 423(d)(5)(A) (“An individual’s statement as to pain or other symptoms shall not alone be conclusive  
20 evidence of disability.”). A claimant is not entitled to benefits under the Social Security Act unless  
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22  
23 <sup>5</sup> In his Cross-Motion to Affirm and Response to Plaintiff’s Motion for Summary Judgment and/or Remand,  
24 Defendant “maintains that [the clear and convincing reasons] standard [when reviewing an ALJ’s decision to discredit  
25 a claimant’s allegations] is inconsistent with the deferential substantial evidence standard set forth in 42 U.S.C. § 405(g)  
26 and with agency regulations and rulings . . . .” ECF No. 27 at 4, n.5. Notwithstanding, the Ninth Circuit has employed  
the clear and convincing reasons standard when reviewing an ALJ’s decision to discredit a claimant’s allegations. *See*  
*Burrell v. Colvin*, 775 F.3d 1133, 1136–37 (9th Cir. 2014); *see also Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir.  
2014); *Robbins v. Soc. Sec. Admin*, 466 F.3d 880, 883 (9th Cir. 2006). This Court is bound to follow Circuit precedent.

27 <sup>6</sup> SSR 96-7p was superseded by SSR 16-3p on March 28, 2016. SSR 16-3p “eliminat[es] the use of the term  
28 ‘credibility’ . . . [to] clarify that subjective symptom evaluation is not an examination of an individual’s character.”  
However, both rulings require an ALJ to consider the same factors in evaluating the intensity, persistence and limiting  
effects of an individual’s symptoms.

1 the claimant is, in fact, disabled, no matter how egregious the ALJ's errors may be. *Strauss v.*  
2 *Comm'r of the Soc. Sec. Admin.*, 635 F.3d 1135, 1138 (9th Cir. 2011).

3 Plaintiff argues the ALJ erred by failing to articulate a clear and convincing reason for  
4 discounting his subjective complaints. ECF No. 16 at 5:13–8:16. In contrast to this argument, the  
5 ALJ found Plaintiff's medically determinable impairments could reasonably be expected to cause  
6 the alleged symptoms at step one of the *Garrison* analysis.<sup>7</sup> AR 16. At step two, however, the ALJ  
7 found Plaintiff's statements concerning the intensity, persistence and limiting effects of these  
8 symptoms were not entirely credible because his "allegations are greater than expected in light of  
9 the objective evidence at the hearing level." *Id.*

10 a. An alleged inconsistency between Plaintiff's testimony and the objective  
11 medical evidence, standing alone, was not a clear and convincing reason to  
discount his symptoms complaints.

12 When determining the extent of Plaintiff's symptoms, the ALJ must consider whether there  
13 are any conflicts between Plaintiff's statements and the objective medical evidence. 20 C.F.R. §  
14 416.929(c)(4). However, an ALJ may not discredit a claimant's symptom testimony and deny  
15 benefits solely because the degree of the symptoms alleged is not supported by objective medical  
16 evidence. *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001); *Bunnell*, 947 F.2d at 346–47;  
17 *Fair v. Bowen*, 885 F.2d 597, 601 (9th Cir. 1999). However, the objective medical evidence is a  
18 relevant factor, along with the medical source's information about the claimant's pain or other  
19 symptoms, in determining the severity of a claimant's symptoms and their disabling effects. *Rollins*,  
20 261 F.3d at 857; 20 C.F.R. §§ 404.1529(c)(2), 416.929(c)(2). SSR 16-3 further provides that the  
21 disability "determination or decision must contain specific reasons for the weight given to the  
22 individual's symptoms, be consistent with and supported by the evidence, and be clearly articulated  
23 so the individual and any subsequent reviewer can assess how the adjudicator evaluated the  
24 individual's symptoms."

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25 <sup>7</sup> In his Cross-Motion and Response, the Commissioner argues that "Plaintiff does not identify which records  
26 corroborate his claims of total inability to engage in light level work[.]" ECF No. 27 at 8:23–24 (emphasis added).  
27 However, the Regulations do not require a plaintiff to produce evidence of total disability at the first step of the credibility  
28 analysis. Instead, "the ALJ must determine whether the claimant has presented objective medical evidence of an  
underlying impairment which could reasonably be expected to produce the pain or other symptoms alleged." *Garrison*,  
759 F.3d at 1014 (internal citation and quotation marks omitted). Here, the ALJ found Plaintiff did so. AR 17.

1 Plaintiff claims the ALJ erred because she “violated the long-standing rule in this Circuit that  
2 a claimant’s testimony may not be rejected solely based on lack of sufficient support from the  
3 objective medical evidence.” ECF No. 16 at 7:15–17 (internal citations omitted). A review of the  
4 Administrative Record shows this to be true. The only explanation the ALJ offered for discounting  
5 Plaintiff’s symptoms complaints was that his “allegations are greater than expected in light of the  
6 objective evidence at the hearing level.” AR 16. Although the ALJ carefully summarized the  
7 objective medical evidence over two pages (AR 16–17), an “adjudicator may not discredit the  
8 claimant’s allegations of the severity of pain solely on the ground that the allegations are unsupported  
9 by the objective medical evidence.” (*Bunnell*, 947 F.2d at 343; *see also Rollins*, 261 F.3d at 857;  
10 *Fair*, 885 F.2d at 601).<sup>8</sup> “If an adjudicator could reject a claim for disability simply because a claim  
11 fails to produce medical evidence supporting the severity of the pain, there would be no reason for  
12 an adjudicator to consider anything other than medical findings.” *Bunnell*, 947 F.3d at 347.

13 The Commissioner nevertheless argues that, “contrary to Plaintiff’s contention, the ALJ did  
14 not solely rely on the objective records to support her assessment, but [instead] looked at the record  
15 as a whole,” including “the various medical records, objective findings, diagnostic evidence, the  
16 opinions of the consultative examiner and State agency doctors.” ECF No. 27 at 5:8–11 (internal  
17 citation omitted). Even if this were true, however, the ALJ erred at this juncture because she merely  
18 summarized the medical evidence and, therefore, failed to provide specific reasons to discount the  
19 aspects of Plaintiff’s testimony which establish disability. That is, “providing a summary of medical  
20 evidence . . . is not the same as providing clear and convincing *reasons* for finding the claimant’s  
21 symptom testimony not credible.” *Brown-Hunter v. Colvin*, 806 F.3d 487, 494 (9th Cir. 2015).

22 Even Defendant’s Cross-Motion and Response in support of affirming the ALJ’s decision  
23 only restates the medical evidence, failing to make a substantive argument on the merits. ECF No.  
24 27 at 5:12–7:9. For example, Defendant insists that “the ALJ noted, Plaintiff admitted that his pain

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26 <sup>8</sup> Plaintiff argues that to find him not credible, “the ALJ must rely either on reasons unrelated to the subjective  
27 testimony such as reputation for dishonesty; on conflicts between his testimony and his own conduct; or on internal  
28 contradictions in that testimony, which the ALJ did not do.” ECF No. 16 at 7:20–23, *citing Robbins*, 466 F.3d at 884.  
However, this standard is based on SSR 96-7p and, therefore, does not apply to this matter. At the time of the ALJ’s  
decision in this case, the regulation that governed the evaluation of symptoms claims was SSR 16-3p, which superseded  
SSR 96-7p on March 28, 2016. *Supra* n. 6.

1 regimen[] worked well and only sought oral pain medication to relieve his symptoms.”<sup>9</sup> *Id.* at 8:14–  
2 15 (internal citations omitted). However, as Plaintiff correctly notes, “this is post-hoc rationale: [t]he  
3 ALJ pointed out some of those facts in summarizing the medical evidence; however, the ALJ  
4 evidently did not find those factors to impugn Casey’s credibility as the ALJ did not rely on these  
5 bases for rejecting Casey’s testimony.” ECF No. 31 at 4:20–24, *citing* AR 17. Indeed, all the ALJ  
6 had to say regarding this issue was that “[t]he claimant reported in January of 2016 that his pain  
7 management regimen was working well (he was taking Norco and Soma).” AR 17 (internal citation  
8 omitted). This lacks the specificity required by law; that is, “the ALJ must identify what [symptom]  
9 testimony is not credible and what evidence undermines the claimant’s complaints.” *Ghanim v.*  
10 *Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (internal citations omitted). As the Commissioner  
11 knows, “[t]he clear and convincing standard is the most demanding required in Social Security  
12 cases.” *Garrison*, 759 F.3d at 1015. In sum, the ALJ’s credibility finding fails to meet this high  
13 evidentiary burden.

14 Accordingly, the ALJ’s sole citation to the purported discrepancy between Plaintiff’s  
15 testimony and the objective medical evidence did not serve as a clear and convincing reason to issue  
16 an adverse credibility finding.

## 17 **2. The ALJ’s RFC Assessment**

18 At step four of the sequential evaluation process, the ALJ must determine the claimant’s  
19 RFC. 20 C.F.R. § 416.920(a)(4)(iv). “[T]he ALJ is responsible for translating and incorporating  
20 clinical findings into a succinct RFC.” *Rounds v. Comm’r Soc. Sec. Admin.*, 807 F.3d 996, 1006  
21 (9th Cir. 2015). “[A]n ALJ’s assessment of a claimant adequately captures restrictions related to  
22 concentration, persistence, or pace where the assessment is consistent with restrictions identified in  
23 the medical testimony.” *Stubbs-Danielson v. Astrue*, 539 F.3d 1169, 1174 (9th Cir. 2008). To the  
24 extent the evidence could be interpreted differently, it is the role of the ALJ to resolve conflicts and

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25 <sup>9</sup> The Commissioner maintains that “the notion that Plaintiff declined surgery is a factor that weighs against his  
26 testimony.” ECF No. 27 at 8:19–20 (internal citation omitted). However, the Court does not discuss Plaintiff’s decision  
27 to decline surgical intervention because the ALJ did not do so in weighing his credibility. Defendant concedes that this  
28 was a factor “not explicitly relied upon by the ALJ.” *Id.* at 8:18–19 (internal citation omitted). In reviewing an ALJ’s  
decision denying Social Security disability benefits, the court is limited to analyzing only those reasons provided by the  
ALJ, and may not affirm the ALJ on a ground upon which he did not rely. 42 U.S.C. § 405(g).

1 ambiguity in the evidence. *Morgan v. Comm’r of Soc. Sec. Admin.*, 169 F.3d 595, 599–600 (9th Cir.  
2 1999). Where evidence is subject to more than one rational interpretation, the ALJ’s conclusion will  
3 be upheld. *Burch*, 400 F.3d at 679. Therefore, a reviewing court will only disturb the ALJ’s findings  
4 if they are not supported by substantial evidence. *Hill v. Astrue*, 698 F.3d 1153, 1158 (9th Cir. 2012).

5 Plaintiff argues that “the ALJ failed to rely on any evidence that a reasonable person would  
6 accept in support of [her] RFC assessment.” ECF No. 16 at 10:12–13. Plaintiff contends the ALJ  
7 erred in interpreting the medical opinion evidence (*id.* at 9:7–17), his testimony (*id.* at 9:18–21), and  
8 the raw medical data (*id.* at 10:1–11) when formulating his RFC. As discussed above, the ALJ’s  
9 credibility finding respecting Plaintiff’s testimony was legally insufficient because her discussion  
10 was unsupported by substantial evidence. It is true that the ALJ’s RFC assessment need only include  
11 those limitations found credible and supported by substantial evidence. *Bayliss v. Barnhart*, 427  
12 F.3d 1211, 1217 (9th Cir. 2005). Here, however, it is unclear whether Plaintiff’s testimony is  
13 credible because the ALJ failed to provide any specific analysis of Plaintiff’s credibility. AR 16–  
14 17. If Plaintiff’s testimony is credible, and supported by substantial evidence, then the ALJ  
15 committed reversible error because she was required to include the limitations to which he testified  
16 in her RFC assessment. For example, if the ALJ were to credit Plaintiff’s testimony that he cannot  
17 sit for four hours or more during an eight-hour work day (AR 37), then all of her hypotheticals, each  
18 predicated on an RFC assessment of sitting six hours out of an eight-hour work day (AR 44–47), are  
19 flawed. Indeed, VE Boroskin confirmed when questioned by Plaintiff’s counsel that “changing the  
20 sitting tolerance to four hours” under the first hypothetical would “preclude work.” AR 48.

21 The Court therefore finds that the ALJ failed to properly consider Plaintiff’s symptoms  
22 complaints when formulating his RFC.<sup>10</sup>

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27 <sup>10</sup> Because the Court finds that remand for further proceedings is warranted on the basis of the ALJ’s unsupported  
28 credibility determination, it declines to discuss whether the ALJ appropriately incorporated the medical opinion evidence  
and clinical findings into her RFC assessment.

#### IV. REMEDY REQUEST

Plaintiff requests that this case be remanded with instructions to pay benefits or, in the alternative, for further administrative proceedings. ECF No. 16 at 8:14–16; 10:13–15 (internal citation omitted).

In *Garrison*, the Ninth Circuit:

devised a three-part credit-as-true standard, each part of which must be satisfied in order for a court to remand to an ALJ with instructions to calculate and award benefits: (1) the record has been fully developed and further administrative proceedings would serve no useful purpose; (2) the ALJ has failed to provide legally sufficient reasons for rejecting evidence, whether claimant testimony or medical opinion; and (3) if the improperly discredited evidence were credited as true, the ALJ would be required to find the claimant disabled on remand.

759 F.3d at 1020 (internal citation omitted). The Ninth Circuit, “not convinced that the ‘crediting as true’ doctrine is mandatory,” has exercised flexibility on other occasions and “remanded solely to allow an ALJ to make specific credibility findings.” *Connett v. Barnhart*, 340 F.3d 871, 876 (9th Cir. 2003).

Here, the credit-as-true standard does not apply because further administrative proceedings concerning Plaintiff’s credibility would serve a useful purpose. *Treichler v. Comm’r of Soc. Sec. Admin.*, 775 F.3d 1090, 1105 (9th Cir. 2014) (“the record raises crucial questions as to the extent of [plaintiff’s] impairment given inconsistencies between his testimony and the medical evidence in the record. These are exactly the sort of issues that should be remanded to the agency for further proceedings”) (internal citation omitted). Indeed, the present circumstances are distinguishable from other cases that have remanded for an immediate payment of benefits. *Cf. Woody v. Astrue*, 357 F. App’x. 765, 767 (9th Cir. 2009) (remanding for an award of benefits because “no outstanding issues remain[ed] to be resolved”); *Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996) (reversing and remanding for determination of benefits because “[t]here are no outstanding issues to preclude [the court] from making a disability determination on the merits.”).

Accordingly, the Court finds that remanding this case with instructions to pay benefits is inappropriate and, instead, will remand this case for further proceedings consistent with this Order.



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**V. CONCLUSION**

The ALJ failed to demonstrate, using the clear and convincing standard, that Plaintiff's testimony should be discounted on the basis of its inconsistency with the objective medical evidence.

The ALJ's RFC assessment was unsupported by substantial evidence because it is unclear on this record whether Plaintiff's symptoms complaints should have been discounted.

**VI. ORDER**

IT IS HEREBY ORDERED that Plaintiff's Motion for Summary Judgment and/or Remand (ECF No. 16) is GRANTED, and that Defendant's Cross-Motion to Affirm and Response to Plaintiff's Motion for Summary Judgment and/or Remand (ECF No. 27) is DENIED.

IT IS FURTHER ORDERED that this matter is remanded for further administrative proceedings consistent with this Order. On remand, the ALJ should determine whether clear and convincing reasons exist to discount Plaintiff's symptoms complaints; assess an RFC after considering Plaintiff's testimony, the medical opinion evidence, and the longitudinal record; and, determine whether Plaintiff is disabled under the Regulations.

DATED this 31st day of March, 2020.

  
ELAYNA J. YOUCHAH  
UNITED STATES MAGISTRATE JUDGE